IN THE COURT OF APPEALS OF IOWA

No. 6-167 / 95-661

STATE OF IOWA,

Plaintiff-Appellee,

vs.

RUTH HARVEY,

Defendant-Appellant.

FILED
MAY 31 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Greene County, Gary L. McMinimee, Judge.

Ruth Harvey appeals the judgment and sentence entered upon her conviction of manufacturing marijuana in violation of Iowa Code sections 124.401(1) and 124.401(1)(d) (1993). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sarah E. Hennesy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Angelina M. Smith, Assistant Attorney General, and Nicola J. Martino, County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ. Vogel, J., takes no part.

HABHAB, P.J.

On June 1, 1994, Grand Junction police executed a search warrant at the home of Ruth Harvey. The warrant was obtained to search for acetylene torches believed to be in the possession of Harvey's teenage sons. The police officers arrived at the Harvey residence around 4:30 p.m. and found no one home. The screen porch was unlocked and the officers entered. On the porch, officers observed seven plants growing in styrofoam cups which they believed to be marijuana.

The officers obtained a second search warrant for controlled substances. Upon execution of this warrant, no additional controlled substances were found. When asked about the plants found on the porch, Harvey told police she thought she had planted sunflower seeds in the cups. Harvey's son, Nick, indicated someone else had been "messing" with the plants.

Harvey was charged with manufacturing a controlled substance. At her trial, the State presented evidence that two of the styrofoam cups contained marijuana plants. Harvey's theory of defense was that Eric Weise, her son's friend, had somehow tampered with the cups on her porch either by removing the seeds she had planted and replacing them with marijuana seeds or by removing her cups and replacing them with cups in which marijuana seeds were planted.

The judge found Harvey guilty as charged. Harvey filed a motion for new trial on the basis of newly-discovered evidence. At the hearing on the motion, Laura Bonjour and Laurie MacDonald testified they were present when Harvey planted the

seeds in the styrofoam cups. They stated the cups shown at trial, which had jagged edges, were not the same cups in which the seeds were planted. The court denied the motion.

Harvey appeals.

I. ***Sufficiency of the Evidence.*** Harvey contends there was insufficient evidence to support her conviction. The standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983).

We must uphold a conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 819 (Iowa 1990). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). Circumstantial evidence is just as probative as direct evidence. *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993); *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We consider all the

evidence at trial, not just the evidence that supports the verdict. *State v. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994). A verdict is binding unless the finding is clearly against the weight of the evidence. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981).

When Harvey was initially asked by the police officers about the plants in the cups, she stated she had planted them and they were sunflower plants. Harvey was then informed by the police officers the plants were likely marijuana plants. Upon request, Harvey then made the following written statement, "I thought I had planted sunflowers, but I guess it wasn't. I brought the seeds from Chicago." At the time of the execution of the search warrant, Harvey made no mention of the possibility the cups had been tampered with or switched.[1]

At trial, however, Harvey suggested Eric Weise had either taken the sunflower seeds out of the cups and planted the marijuana seeds or replaced the original cups containing sunflower seeds with cups containing marijuana seeds. Neither of these possibilities were suggested by Harvey when the police officers originally questioned her.

The credibility of the witnesses is a determination to be made by the finder of fact. *State v. Spaulding*, 313 N.W.2d 878, 882 (Iowa 1981); *State v. Ruiz*, 496 N.W.2d 789, 792 (Iowa App. 1992). The district court specifically found Harvey was

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[1] Harvey's son, Nick, did tell police it was possible Eric Weise had "messed with" the cups.

not a credible witness at trial. The court based this determination on the inconsistencies between what Harvey told police officers and her testimony at trial. The district court, in commenting on Harvey's lack of credibility and the credibility of her suggestions regarding Eric Weise, stated in part:

> This court does not find Ms. Harvey to be a credible witness. She initially told the officers that the plants were sunflowers, although at trial she stated she had determined at least the day before that the plants were not sunflowers but probably weeds and that she had planned to replant the containers. When the officers told her the plants appeared to be marijuana, she gave the officers a written statement that implied she must have mistakenly planted something other than sunflower seeds. At trial, she admitted she could identify sunflower seeds and marijuana seeds are significantly smaller. This court does not believe the statements Ms. Harvey gave to the police at her home on June 1 were the product of stress, but rather an effort to mislead police and are evidence of guilt. Although it would have been possible for someone to have switched Bozo containers or the seeds in the containers, there is no reasonable basis for believing anyone did so. There is nothing in the officer's investigation to suggest any such third person was involved. Moreover, any such theory flies in the face of common sense. Generally, there would be no real risk to growing marijuana until it emerged, and no one would have expected the plants to have been grown very long after emergence without Ms. Harvey recognizing that the plants were not sunflowers. Accordingly, no such third person would have expected to be able to harvest the plants.

Considerable deference is given to the district court's findings on credibility of witnesses. *State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993); *State v. Farris*, 359 N.W.2d 190, 192 (Iowa 1984). We agree with the district court's determination regarding the credibility of Harvey. We also find the district court's analysis of Harvey's explanations regarding Eric Weise to be persuasive.

We find, in viewing the evidence in the light most favorable to the State, there is substantial evidence in the record to support Harvey's conviction for manufacturing marijuana.

II. ***Ineffective Assistance of Counsel.*** Harvey contends her trial counsel was ineffective. Specifically, Harvey argues her counsel failed to fully investigate and present evidence which allegedly would have supported her defense. In reviewing claims of ineffective assistance of counsel, we review de novo the totality of relevant circumstances. *State v. Risdal*, 404 N.W.2d 130, 131 (Iowa 1987). The burden of proof in such claims rests with the defendant. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A claim of ineffective assistance of counsel requires a showing that: (1) counsel's performance fell outside the normal range of competency; and (2) the deficient performance so prejudiced the defendant as to give rise to a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992). In order to meet the first prong, defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To succeed on the second prong, the defendant must show that counsel's failure worked to the defendant's actual and substantial disadvantage so that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *McKettrick*, 480 N.W.2d at 56. Such claims may be decided on direct appeal, however, if the defendant fails to show one of the two prongs. *State v. Walker*, 538 N.W.2d 316, 322 (Iowa App. 1995); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App. 1995).

We find the prejudice prong of the ineffective assistance of counsel test cannot be met. Harvey contends testimony by Ms. Bonjour and Ms. MacDonald would have bolstered her defense since they both helped plant the seeds. However, the testimony Harvey argues these witnesses could have provided would have contradicted some of Harvey's testimony at trial. Consequently, if these witnesses had testified, they could have damaged Harvey's credibility. Since the witnesses could have damaged Harvey's case, we cannot find Harvey was prejudiced by the failure of Harvey's counsel to call them to testify. We also find Harvey's counsel made thorough investigations into Harvey's defense theories. Harvey's claim of ineffective assistance of counsel is without merit and must fail.

We affirm Harvey's conviction and deny her claim of ineffective assistance of counsel.

AFFIRMED.